Queensland Law Reform Commission

Non-fatal strangulation: Section 315A review:

A holistic review of the non-fatal strangulation offence

Consultation Paper April 2025

Submission by Criminal Law Services, Legal Aid Queensland

20 June 2025

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission to the Queensland Law Reform Commission ('QLRC') addressing the proposals and questions posed in the Non-fatal Strangulation: Section 315A review Consultation Paper released in April 2025.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals.

This submission calls upon the experience of LAQ's lawyers in Criminal Law Services, the largest criminal law practice in Queensland, the Public Defenders Chambers, and LAQ's regional offices. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

Submission

Proposal 1

Section 315A of the Criminal Code should be repealed and replaced with three new offences:

- **Offence 1:** unlawfully doing particular conduct that restricts respiration and/or blood circulation in the context of a domestic setting. This offence would prescribe a maximum penalty of 14 years' imprisonment.
- **Offence 2:** unlawfully doing particular conduct in the context of a domestic setting. This offence would prescribe a maximum penalty of 7 years' imprisonment.
- **Offence 3:** unlawfully doing particular conduct that restricts respiration and/or blood circulation. This offence would prescribe a maximum penalty of 10 years' imprisonment.

Question 1: What are your views on proposal 1?
Question 2: What conduct should each of the three new offences criminalise?

LAQ's Criminal Law Services (CLS) does not support the creation of three new offences. The current approach, of a single offence that applies to domestic settings and requires proof of some restriction of breath, is preferable to the proposed model for reasons outlined below.

The three proposed offences would capture a markedly wider range of conduct than the existing s 315A offence. However, almost all of that range would already be captured by existing offences, such as common assault and assault occasioning bodily harm ("AOBH").

Proposed Offence 2

CLS strongly opposes creating offence 2. In particular, CLS opposes criminalising, with a maximum penalty of 7 years imprisonment, conduct of applying pressure to certain parts of the body without either a result element of restricting breath or a mental element of intending to restrict breath. CLS's understanding from [115] of the Consultation Paper is that Offence 2 would criminalise applying pressure to another's neck or chest or covering another's nose or mouth (**the proposed conduct**).

This is an incredibly broad offence to have a maximum penalty of 7 years imprisonment. The Consultation Paper suggests the proposed conduct ought to be given its own offence with a higher maximum penalty than 3 years because:

1. common assault does not adequately reflect the risk of future homicide; and
2. the terrorising impact of the conduct.[1]

These two reasons do not, properly analysed, justify enacting offence 2.

The reasoning linked to reflect future risk is most concerning. For any offence, this would be a fundamental breach of the principle identified in *R v De Simoni* (1981) 147 CLR 383. The High Court recently observed,

> "The principle in *De Simoni*, stated by Gibbs CJ, is that:
>
> > "[A] judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot

[1] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [137].

take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

The appellant is correct in submitting that the *De Simoni* principle operates for the benefit of the offender and does not apply to preclude a sentencing court from taking into account the absence of a factor if, which present, may have rendered the offender guilty of a more serious offence. This is because ***the De Simoni principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted***. This is not to say that the Court of Criminal Appeal was wrong to hold that a judge sentencing an offender for an offence of assault occasioning actual bodily harm would err if the judge assessed the seriousness of the offence by taking into account that the offender had not inflicted grievous bodily harm upon the victim. ***The judge would err because, plainly enough, that fact is irrelevant to the assessment*** of the seriousness of an assault occasioning actual bodily harm."[2]

Further, CLS notes the offence would apply to both domestic and non-domestic settings. In non-domestic settings, there is no evidence the proposed conduct is associated with a higher risk of homicide to the victim. In domestic settings, there is also insufficient evidence that *all* of the proposed conduct is associated with a higher risk of homicide to a victim; for example, it is not apparent that a strike to the chest or neck (which would involve the application of pressure) is associated with a higher risk of domestic homicide.

The Consultation Paper refers to the suggestion that offenders 'desire to take the victim-survivor's life into their hands'.[3] This is not a uniquely apt description of the proposed conduct, particularly when compared to conduct excluded from this offence, like punching or slapping someone to the face or head. The proposed conduct is broadly defined such that it would include minor assaults that may not be said to terrorise victims more than other common assaults. Such an increase in penalty is out of proportion to the conduct, noting the range of sentencing goals beyond denunciation and punishment.

Further, the Consultation Paper has not identified that there is a trend or pattern of persons committing the proposed conduct and then receiving an inadequate penalty under another criminal offence, such as common assault, contravention of a domestic violence order ("CDVO") or AOBH. In the experience of CLS practitioners, perpetrators, in domestic settings, will often be able to be charged with CDVO instead of or in addition to common assault, and in many cases the maximum penalty will be 5 years, as the CDVO will be charged with the circumstance of aggravation of having been convicted of a domestic violence offence in the past five years.[4] So, often, the maximum penalty they currently face, particularly in the domestic setting, is higher than 3 years. CLS refers to the recent Court of Appeal decision in *CDL v Commissioner of Police* [2024] QCA 245 as an example of the penalties imposed in related to CDVO offences with a circumstance of aggravation, even where there is no physical violence involved.[5]

---

[2] *R v Nguyen* (2016) 256 CLR656 at [28]-[29], citations omitted, emphasis added.

[3] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [136].

[4] See *Domestic and Family Violence Protection Act 2012* (Qld), s 177(2)(a).

[5] *CDL v Commissioner of Police* [2024] QCA 345 at [23](b) during analysis of *RJD v Queensland Police Service* [2018] QDC 147.

Finally, there is no evidence that increasing the maximum penalty to 7 years imprisonment, from 3 years in cases of assault where there is no bodily harm, would have any greater deterrent effect. This is discussed further below.

Proposed Offence 3

CLS does not, on balance, support the creation of an unlawful strangulation offence that extends to non-domestic settings. The offence of unlawful strangulation should only be extended to all non-domestic settings if there is evidence supporting the conclusion that such an extension is appropriate. There is no such evidence.

Outside the situations which are within the current definition of domestic relationship and those that are close to a domestic relationship and which could be captured by a modest widening of the definition, no evidence of high rates of non-consensual choking or strangulation in the community has been presented. Nor is there evidence, in that population, of increasing rates of choking or acts restricting breath. In any situation where a person would be charged under proposed offence 3, they could already be charged with other criminal offences, such as common assault and AOBH.

Given the absence of evidence that restricting breath outside of domestic situations is associated with a higher risk of homicide,[6] there is no justification to have a maximum penalty of *10 years*, compared to a common assault maximum penalty of 3 years. There is also no evidence that choosing a maximum penalty as high as 10 years imprisonment (compared to 3 years for common assault and 7 years for the current unlawful strangulation offence) would have any greater deterrent effect.

If the QLRC nonetheless concludes there needs to be some special liability for restricting breath in situations not related to personal or sexual relationships, this would be better achieved by creating a circumstance of aggravation for the offence of common assault. The circumstances of aggravation would apply when the application of force causes a restriction in breath or blood circulation and would increase the maximum penalty from 3 years imprisonment to 5 years imprisonment. This would sit comfortably, and consistently, with the 7-year maximum penalty for restrictions of breath in domestic settings under s 315A, as that domestic setting is aggravating.

Proposed maximum penalties

CLS strongly opposes the high maximum penalties suggested by the Commission for the proposed offences, namely:

- 14 years imprisonment for proposed offence 1;
- 7 years imprisonment for proposed offence 2; and
- 10 years imprisonment for proposed offence 3.

The new maximum penalty for proposed offence 1 represents a *doubling* of the penalty for conduct currently captured within a s 315A offence. Such an increase is well out of step with other Australian jurisdictions,[7] and would only be surpassed by the maximum penalty available in Tasmania.[8] The maximum penalties in other comparable Commonwealth jurisdictions also do not support a maximum of 14 years imprisonment.[9] CLS observes that the proposed

[6] As opposed to being a risk factor for intimate partner homicide.

[7] See *Crimes Act 1958* (Vic), s 34AE; *Criminal Code* (WA), s 298; *Criminal Law Consolidation Act 1935* (SA), s 20A; *Criminal Code* (NT), s 186AA.

[8] *Criminal Code* (TAS), s 170B.

[9] For example, the maximum penalties are: 7 years imprisonment in New Zealand (*Crimes Act 1961* (NZ), s 189A), 5 years imprisonment in England and Wales (*Serious Crime Act 2015*, s 75A), 14 years imprisonment in Northern Ireland (*Justice (Sexual Offences and Trafficking Victims) Act 2022*, s 28, but

penalties for each new proposed offences are only briefly discussed within the Consultation paper.[10] It is unclear as to what, if any, empirical evidence supports the proposed increase in maximum penalty, nor what sentencing goal or goals under the *Penalties and Sentences Act 1992* are to be better achieved by such a change.

It is well established that increases in maximum penalty typically produce a general increase in the severity of sentences for that offence.[11] Presumably, although it is not stated in the Consultation Paper, the QLRC is suggesting generally higher sentences for conduct currently encapsulated by s 315A of the Code will follow any enactment of the proposed maximum penalties.

CLS observes that it is well established that increasing the length of sentences of imprisonment for an offence leads to little if any reduction in crime; that is, increasing the penalty does not generally have a deterrent effect.[12] This has been recognised by the Victorian Sentencing Council.[13] Offences of violence are of course no exception to these findings. Increasing maximum penalties on the basis of reducing or deterring offences involving the restriction of breath is not evidence-based.

CLS supports reducing the rates of violence in the community, including violence against women. However, the proposed increases in maximum penalty will not achieve that - as they will not improve on achieving the goals of deterrence or lasting community protection[14] - *and* they will have several negative effects. These include the increasing costs from incarcerating people for longer periods and perpetuating the over-representation of Aboriginal and/or Torres Strait Islander peoples in custody. Moreover, if the potential penalty is increased as significantly as is proposed, CLS expects more defendants will proceed to trial, and, if summary disposition becomes an option, fewer cases will be able to be dealt with summarily than if the maximum penalty remains as is.

One of the QLRC's main justifications for the increase seems to be a rudimentary comparison to other offences: that the maximum penalty for coercive control is 14 years imprisonment, and for AOBH the maximum penalty is 7 years, with some stakeholders suggesting choking is far more serious than AOBH.[15] CLS considers this comparison to AOBH is misleading. AOBH offences can vary markedly, from the brief infliction of minor injuries to a protracted assault involving the infliction of multiple injuries falling just shy of grievous bodily harm. While lower-level offences of AOBH can attract community-based orders, serious cases routinely involve the imposition of sentences well above 3 years imprisonment, which is above the average penalty for choking. CLS submits that the gravest offences of AOBH are roughly similar in seriousness to the graver offences of choking (that do not cause GBH). The comparison thus does not support the proposed increase.

---

noting the offence also requires proof of the defendant intending to restrict breath or blood flow to the complainant's brain or being reckless as to doing so), and 10 years imprisonment in Ireland (*Non-Fatal Offences Against the Person Act 1997*, s 3A).

[10] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [180] to [186].

[11] See *QPS v Terare* [2014] QCA 260 at [35]; *R v CBI* [2013] QCA 186 at [19] (and the cases there cited); *R v T; ex parte Attorney-General (Qld)* [2002] QCA 132 at [22]-[23], [29].

[12] Bagaric, Alexander and Edney, *Sentencing Australia* (6th ed, 2018) at [400.1120] - [400.1700] (pp 208-218); see also *Yardley v Betts* (1979) 1 A Crim R 329 at 333.

[13] Sentencing Advisory Council (Victoria), *Does Imprisonment Deter? A Review of the Evidence* (2011), URL: www.sentencingcouncil.vic.gov.au.

[14] Deterrence and protection are sentencing goals at *Penalties and Sentences Act 1992*, s 9(1)(c),(e).

[15] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [180] and [182].

As to the comparison with coercive control, CLS submits it is incumbent on the QLRC to apply its own evidence-based approach in this review. If another offence has had a maximum penalty determined in a way that is not evidence-based, it is inappropriate to simply peg the penalty of offence 1 based on a comparison to that other offence. CLS submits the choice of 14 years imprisonment for coercive control may not reflect the evidence as to what will in fact deter and protect the community from coercive control. The maximum penalty was not determined by an evidence-based body like the QLRC. In any event, coercive control could reflect an incredibly wide range of conduct, including protracted conduct that would not be seen for a single offence of choking. Coercive control is on offence that is yet to be tested. It would often not be an offence of physical violence. For all those reasons, it is inappropriate to use it as a comparison or starting point.

The remaining justification appears to be that a higher maximum may more appropriately reflect the gravity of the conduct, given the increased risk of future homicide, and to 'reflect the potential for serious harm to result from strangulation'.[16] For the reasons discussed above, CLS submits that 7 years imprisonment does adequately reflect the gravity for the worst cases. The QLRC cites from the Queensland Sentencing and Advisory Council's research that, in 2022-23, the average sentence was 2.7 years imprisonment, with sentences up to 6.5 years imprisonment imposed.[17] CLS submits such penalties do adequately punish and denounce the conduct of choking. These are long periods of imprisonment; the offenders lose years of their life to prison. Moreover, the Consultation Paper does not cite evidence that community considers such penalties do not adequately punish the offender and denounce the conduct. Absent that evidence, it is unsafe for the QLRC to claim a penalty that is twice as high as what currently exists in Queensland and other states better reflects the gravity. While there may be an association between strangulation and future homicide in domestic settings, that does not establish causation. It is inappropriate in criminal law to punish an offender, not because of their conduct, but because it is correlated with future conduct. In any event, it is the criminalisation and punishment of offenders (along with Protection Orders) that will hopefully sever the association link - there is no evidence that a longer time in custody would somehow reduce that association. Finally, it is inappropriate to increase the penalty because of the potential that their conduct may cause injury that is difficult to prove. That is already incorporated into the fact the penalty for a s 315A offence where no visible injuries are caused is much higher than the 3 years of common assault.

In summary, an increase in maximum penalty, particularly to one as high as 14 years imprisonment, is not evidence-based or justified.

These reasons apply *a priori* to proposed offences 2 and 3 and the proposed maximum penalties of, respectively, 7 years imprisonment and 10 years imprisonment. Each of these are great jumps in penalty from 3 years imprisonment for common assault or 5 years imprisonment for CDVO (aggravated).

CLS urges the QLRC to reconsider its position on the proposed maximum penalties for the proposed offences. The maximum penalty for proposed offence 1 should be 7 years imprisonment. If, contrary to the recommendations of CLS, proposed offences 2 and/or 3 are created, the maximum penalties should be less than 7 years imprisonment.

If the Commission, contrary to CLS's position, decides to increase the maximum penalty for offending captured by proposed offence 1, CLS urges the Commission to conclude that 10

[16] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [182] and [186].

[17] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [185] & [228] citing Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* (May 2024), 13.

years imprisonment would be more suitable. It would already represent a significant increase of 3 years, which would be followed by an uplift in sentences.

Question 3: What are your views about consent, including:

- **Whether the 'without consent' requirement should be removed or retained?**
- **The circumstances in which the requirement should apply?**
- **Whether lack of consent should be an element or defence?**
- **How consent should be defined?**

Retaining or removing 'without consent'

CLS strongly opposes removing the element of 'without consent' from the offence of unlawful strangulation. If the Commission recommends the creation of three new offences, CLS submits that each should contain an element that the conduct occurs 'without consent'.

People in Queensland ought have the autonomy to voluntarily engage in sports and other physical activities, like martial arts and wrestling, and consent to restrictions on breath that may be a mutually intended or incidental part of the activity. If the offence is extended to non-domestic settings, the element of consent could significantly affect how these physical activities are conducted.

People ought also have the freedom and autonomy, which they currently enjoy, to choose to engage in an act of restricting breath as part of consensual sexual activities. Consistent with this concept of freedom and autonomy, there is no jurisdiction in Australia which has entirely removed the element of 'without consent' from strangulation offences. While consensual restrictions on breath may involve some risks to health, the criminal law is an incredibly poor tool to encourage, or try to force, people to make decisions about their health. Attempts to do so have adverse consequences, and typically result in the over-incarceration of disadvantaged groups.

Restrictions of 'without consent' depending on harm caused and/or intended

CLS considers there is insufficient reason to remove the element of 'without consent' from a subset of strangulation offences. Common law has developed to provide a distinction in regard to what can be consented to between assaults such as common assault and AOBH, and more serious assaults, for example where grievous bodily harm occurs. A person may be able to consent to an act that causes an expected level of 'bodily harm', but cannot consent to an act that causes 'grievous bodily harm', as those terms are defined in s 1 of the Code.[18] This is reflective of a public policy perspective of preventing serious harm to an individual, whilst promoting a person's autonomy and freedom to engage in physical activities that present a risk of minor harm.

It is the experience of CLS practitioners that in cases where a person is charged with unlawful strangulation, if a physical injury has been caused, it usually amounts to bodily harm but not grievous bodily harm. If an injury does occur that constitutes grievous bodily harm,[19] in CLS lawyers' experience the defendant is charged with the more serious offence of grievous bodily harm. The issue of consent, or lack thereof, is not required to be proved beyond reasonable doubt, and the defendant is exposed to a maximum penalty of 14 years imprisonment.

Accordingly, there is no reason to remove the 'without consent' element for cases where harm (however defined) is caused or intended, and to do so would be inconsistent with the approach

[18] See *Kirkpatrick v Tully* [1991] 2 Qld R 291 at 293.
[19] *Criminal Code 1899* (Qld), s 1 definition of 'grievous bodily harm'.

to offences such as AOBH and is a duplication of existing offences. It is also particularly concerning considering the proposed expansion of circumstances to which an unlawful strangulation might apply.

Element or defence

CLS supports retaining 'without consent' as an element, rather than providing for consent to be a defence. That is consistent with the approach in NSW, South Australia and the Northern Territory.[20] It is CLS's experience that consent is not often in issue in cases of unlawful strangulation that proceed to trial. Evidence of consent is not difficult for the prosecution to briefly adduce; as part of a police statement, and briefly during examination-in-chief at trial. It is very rare that a complainant is asked or examined at trial about their general willingness to be strangled. Concern about such a practice, to the extent it is raised at [159] of the consultation paper, is not well founded. But that is not to say that the burden to prove a lack of consent ought not be on the prosecution.

There are several other matters that weigh in favour of retaining the question of consent as an element. First, the Queensland Police Service is already experienced and trained in gathering evidence about consent from investigations of assaults and sexual offences. Second, retaining 'without consent' as an element is more consistent with the way in which offences with assault as an element, such as AOBH, and sexual offences, are criminalised. Namely, that it is for the prosecution to prove a lack of consent, rather than for a defendant to raise a defence of consent.[21] Where more serious injuries are sustained, there is already a sufficient range of offences to reflect that seriousness that omit consent as an element. Third, making consent a defence adds an unnecessary layer of complexity to a trial if judges also have to determine whether sufficient evidence has been adduced to raise the defence of consent.

If the meaning of consent is altered such that it is defined more stringently, such as in an affirmative consent model, or informed consent model, then that weighs in favour of retaining it as an element.

Defining consent

CLS considers the better position is to leave 'consent' undefined under the *Criminal Code* (Qld). Choking is an act of violence. For offences for which assault is an element, other than indecent assault, consent is not defined in the Code. It is appropriate that unlawful strangulation, also an offence of violence, is defined consistently. CLS submits there should only be a change in approach if there is demonstrated inadequacy in the way consent is defined at common law. No such inadequacy has been demonstrated. Leaving consent undefined allows its meaning to be refined and developed incrementally at common law, in a manner appropriate to the issues that arise in actual cases and allows more easily for current community standards to be applied by the jury.

CLS strongly opposes adopting an informed consent model. That is, a model where not only does a person need to give their free and voluntary consent, but they would need to understand the dangers and risks associated with strangulation. While CLS supports an education campaign on the dangers associated with strangulation, an informed consent model in this context is an entirely inappropriate model for criminal law-making. It places a significant onus on a defendant: if they and the complainant agree to engage in an act restricting breath, the defendant would have to be knowledgeable about the risks of strangulation, and then quiz and verify the complainant's understanding of the risk and dangers of choking. Defendants

[20] *Crimes Act 1900* (NSW), s 37(1A); *Criminal Law Consolidation Act 1935* (SA), s 20A(1); *Criminal Code* (NT), s 186AA(1)(c).

[21] See *Criminal Code* (Qld), s 245 (assault is defined in a way that requires a lack of consent), s 348.

charged with strangulation or offences of violence are far more typically from, or living in, situations of great disadvantage compared to the average population. They will have experienced worse education outcomes. A not insignificant number have an intellectual impairment, or some other neurological condition. An informed consent model would expect such disadvantaged persons to research and learn about the effects of choking. That is unfair, if not incredibly difficult for those with intellectual limitations. It will also often be the case that the other person engaged in a consensual act of choking will come from a similarly disadvantaged background. In light of the proposed expansion of the s 315A offence to apply to a broadened range of activities, and CLS considers it would be wholly inappropriate to apply this model of consent across the board.

In any event, there is no evidence such an approach would in fact encourage people to research the effects of choking or permit further understanding. It is more likely to penalise defendants because they and/or the complainant are disadvantaged and have little education and/or understanding about choking. It will thereby exacerbate the over-incarceration of certain minority groups, such as Aboriginal and/or Torres Strait Islander peoples. Occasional education campaigns cannot counter these effects.

CLS understands that the question of whether consent is voluntarily obtained can be more complicated in relationships containing domestic violence. A more appropriate response to the presence of domestic violence may be to permit certain evidence of domestic violence on the question of voluntariness if the element is in issue.

In CLS's view, reform on this issue is unnecessary. Seeking to define consent in either manner is apt to lead to confusion and a lack of clarity, particularly in circumstances where multiple provisions and definitions may apply which would further complicate matters for the jury.

Question 4: When should non-fatal strangulation be lawful?

CLS is cognisant that many defences to non-fatal strangulation could be affected by the outcome of the QLRC's Review of Particular Criminal Defences. CLS opposes any attempt to remove the existing availability of defence provisions and submits that consent should be able to be given for non-fatal strangulation as discussed in the response to Question 3.

CLS considers that the defences should remain open for consideration if raised on the evidence in the circumstances of each case; this ensures the greatest flexibility to reflect the individual circumstances of a case and ensures avoidance of unintended consequences.

In CLS's experience the most common defences raised in these matters are self-defence and, defence of another. The remaining defences are very case specific and could only be raised in a minority of matters; but that does not mean that their availability ought be removed. The trial judge is required to assess whether such a defence is raised on the evidence before leaving the defence to the jury for consideration. They have a responsibility to assist the jury, through directions on the law, who will assess the reasonableness of such a defence if raised in each case.

Defences that exist under the Criminal Code, relevant to the use of force, already involve concepts of lawfulness, reasonableness and proportionality. Those concepts are assessed by members of the jury against contemporary standards. For example, in *R v DBG* [2013] QCA 370, involving an assault by the appellant on his 14 year old daughter, and the defence of domestic discipline.[22] The jury were asked to consider whether the prosecution had satisfied them beyond reasonable doubt that the application of force was not by way of

[22] *Criminal Code 1899* (Qld) s 280.

correction, discipline or control, or that the force was not reasonable under the circumstances.[23]

> "…that it was for each juror to consider whether he or she was satisfied that the prosecution had proved beyond reasonable doubt that the force used was not reasonable. The jurors were to do so by reference to their own assessment of reasonableness. They were not required to make an assessment of an abstract community standard of reasonableness and then adopt it as the measure against which the reasonableness of the appellant's conduct was to be adjudged."[24]

CLS does not consider it necessary to prescribe a non-exhaustive list of factors relevant to assessing 'reasonableness'. As CLS submitted to the Criminal Defences review, such lists risk a jury wrongly applying such a list of matters in an exhaustive way, and is inconsistent with the position in other Australian jurisdictions.[25] It might be that the development of a bench book direction could provide some guidance where required as to the relevant considerations which could assist the jury in applying the law to the facts of any individual case.

Further, CLS considers that non-fatal strangulation should be lawful in a sporting context when within the rules of the game, and during consensual sexual activity or other such circumstances where consent has been given. This is discussed in the response to Question 3.

Proposal 2

The existing defences in the Criminal Code of provocation to assault (s 269), prevention of repetition of insult (s 270), and domestic discipline (s 280) should not apply to the three new offences.

Question 5: What are your views on proposal 2?

CLS does not support the proposition that these defence provisions ought not apply to the three proposed offences. The defence provisions all contain significant limitations in their use, which restrict their application when considered by the arbiter of fact. The defences must be raised on the evidence before it becomes available for consideration. The prosecution then bears the onus of disproving the defence, once raised, beyond reasonable doubt. They are heavily moderated within the court process.

Prevention of repetition of insult

This defence will be negatived if the prosecution can satisfy a court that: -

a) The force used by the accused was not reasonably necessary (i.e. that, rather than being reasonably necessary to prevent the repetition of the act or insult, the force used was not reasonably necessary, or that it was excessive or disproportionate); or

[23] *R v DBG* [2013] QCA 370, [18].
[24] *R v DBG* [2013] QCA 370, [31].
[25] Legal Aid Queensland, Submission to the QLRC, Review of Particular Criminal Defences: Equality and integrity: Reforming criminal defences in Queensland (7 May 2025), page 5; QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [178].

b) The act or insult was not of such a nature as to be provocation to the person for an assault; or

c) The force used was intended, or was likely, to cause death or grievous bodily harm (even if death or grievous bodily harm did not necessarily occur).

This defence is unlikely to be available in many circumstances of choking offences given the grave circumstances associated with choking (grabbing a complainant around the neck, such as to prevent or restrict breathing). A trial Judge would have to be satisfied that the defence should be left to a jury. A jury would need to consider whether such force was reasonable. In many circumstances these defences would not be raised or alternatively would not be considered reasonable. That is not to say that the defence ought not be available at all. Leaving the defence available however would allow their use in certain circumstances and prevent unintended consequences that result in injustices.

There is public interest in preserving the availability of a section 270 defence, including for those who offend as DFV victim survivors. The Women's Safety and Justice Taskforce previously noted concerns that current laws do not protect the rights of desperate victims when reviewing criminal defences in Queensland.[26] Removing the applicability of the defence could have the unintended consequence of denying the defence to the person who is the one most in need of protection in a relevant relationship who may have acted in circumstances the greater community may find reasonable. Once again it requires the defence to be raised and the jury to find it reasonable which would be in the minority of circumstances.

Removal of this defence could also serve to further criminalise Aboriginal and/or Torres Strait Islander victim survivors who offend in this context. Despite representing approximately 4.6% of Queensland's population, Aboriginal and/or Torres Strait Islander people account for 26.5% of people sentenced for strangulation where that is the most serious offence.[27] The QLRC has previously noted that repealing or, in CLS's submission – restricting, access to this defence will have significant detrimental impact on the Aboriginal and/or Torres Strait Islander people.[28]

Domestic discipline

As submitted to the Criminal Defences Review, it is CLS's experience that the defence of domestic discipline is infrequently relied upon and rarely successful. Where the defence has been successful, it has turned on very specific, unusual features of a limited number of cases.

Case Study

LAQ represented a defendant at trial in relation to a s 315A offence where the complainant was his 15-year-old son. Evidence at trial[29] included that over the preceding years the complainant had displayed increasingly difficult behaviours. He was difficult to manage at school, had behaved aggressively towards other children and his own, much younger, siblings (including partaking in physical abuse), and had been self-harming. His parents had sought the assistance of their

[26] Recommendation 71, Women's Safety and Justice Taskforce.
[27] Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* (May 2024), 5.
[28] QLRC, Review of particular criminal defences: Equality and integrity: Reforming criminal defences in Queensland (Consultation Paper, February 2025), [302-304].
[29] The defence did not give or call evidence.

> General Practitioner, and a mental health care plan involving a psychologist was put in place. One day, after intervening in rough play between the complainant and his siblings, the defendant told him to go to his room. The manner in which he did so caused concern for the defendant, who shortly attended the complainant's room and tried to comfort him by placing his arms around the complainant. The complainant attempted to punch the defendant, and began pushing and shoving the defendant, who then held the complainant down on the bed. In doing so, he placed his hand on the neck/shoulder area of the complainant for between 3 and 5 seconds before desisting when the complainant told him he couldn't breathe. The initial complaint was made by the mother of the complainant, with whom the defendant was separated but living in the same residence; she gave varied versions of events at trial. Directions regarding both domestic discipline and self-defence were given to the jury (though self-defence had not been specifically relied upon). The jury returned a verdict of not guilty within 22 minutes of commencing their deliberations.

CLS cautions against the complete removal of the availability of this defence, particularly in circumstances where the conduct sought to be captured under proposed offence 2 would be considerably broad.

The research conducted by the QLRC and its recent publication *Domestic discipline defence: Key insights into police practices,*[30] finds that police apply the defence inconsistently in determining whether to charge a person with an offence.[31] CLS supports the broad concept of a diversion scheme for police to divert people who may otherwise be charged with an offence involving an assault against a child. The experience of CLS practitioners is that diversion schemes, when developed and administered carefully, provide a valuable alternative to criminalisation of people who otherwise would not be involved in the criminal justice system. Another advantage is increasing the cost-effectiveness and speed of resolving complaints. If a diversion scheme was to be created, care would need to be taken in devising the scheme to ensure that there are sufficient police resources to support the scheme, and legal advice is made available to anyone being offered a diversion. Guidelines for the scheme would need to be developed in consultation with the relevant stakeholders.

Question 6: Are there other defences you think should not apply to one or more of the new offences?

CLS strongly opposes any attempt to remove the availability of defences to the three proposed offences. The longstanding and tested protections afforded to defendants in the Criminal Code have finely balanced considerations, including the public interest, the interests of victims and the interests of defendants. These defence provisions all contain significant limitations, as discussed above, which restrict their application when considered by the arbiter of fact. The defence must be raised on the evidence before it becomes available for consideration. The prosecution then bears the onus of disproving the defence, once raised, beyond reasonable doubt, and it is for a cross-section of the community to decide whether they are applicable within the facts of any particular case.

---

[30] QLRC, Review of particular criminal defences – Domestic discipline defences: Key insights into police practices (Research Report 3, June 2025).

[31] Key Finding 3, QLRC, Review of particular criminal defences – Domestic discipline defences: Key insights into police practices (Research Report 3, June 2025), 5.

The removal of any additional defences for non-fatal strangulation could also have unintended consequences, especially in circumstances where the conduct captured by the new proposed offence provisions is widened. CLS also notes the availability of any of the defences could potentially be affected by the outcome of the Review of Particular Criminal Defences. CLS is concerned that any attempt to implement the proposed reforms in a piecemeal fashion risks significant unintended consequences and injustices. CLS noted in its submission to the QLRC's Review of Particular Criminal Defences that "siloed approaches to the criminal justice system often overlook the fact that defences…… may operate to protect the most vulnerable and disadvantaged: - the long-term victim-survivor of domestic violence … or the disproportionate number of First Nations persons engaged with the criminal justice system".[32]

[32] Legal Aid Queensland, Submission to the QLRC, Review of Particular Criminal Defences: Equality and integrity: Reforming criminal defences in Queensland (7 May 2025), page 2.

Proposal 3

Adult perpetrators who plead guilty should be sentenced in the Magistrates Court:
- unless the perpetrator elects otherwise
- subject to the Magistrate's overriding discretion.

Legally represented child perpetrators should continue to be able to consent to have their case tried or sentenced in the Childrens Court (Magistrate).

Question 7: What are your views on proposal 3?

CLS broadly supports the ability to finalise non-fatal strangulation in the Magistrates Court where a defendant pleads guilty unless they elect otherwise[33]. CLS agrees that the current position for child defendants should remain. However, CLS is concerned as to whether the proposal to increase the maximum penalties will negatively impact the intended purpose of this reform, to reduce the time taken to finalise a matter.

CLS accepts that finalising matters before a Magistrates Court is significantly more expedient than finalisation before a higher court, even where a matter proceeds to sentence. The QLRC has explored the many impacts on both a defendant and victim-survivor in the consultation paper, and the ability to finalise cases of non-fatal strangulation in the Magistrates Court could allow a level of certainty for not only the accused but also the victim survivor. It would also likely reduce the amount of time a defendant is on remand before finalising their matter.

There are practical benefits for all parties involved allowing the summary finalisation of choking matters where the matter is not contested. In addition to certainty and more expedient justice, summary disposition also comes at significantly less cost to all parties involved. It would also reduce demand on the District Court List providing for additional availability to deal with other serious indictable offences in a more expedient manner. It would reduce the cost associated with remand, with CLS practitioner experience indicating that defendants often spend significant time in pre-sentence custody, sometimes well in excess of the "bottom" of any sentence that would be imposed. It would also alleviate some pressure on community corrections.

CLS recognises that there would be a positive financial impact on LAQ for non-fatal strangulation matters that proceed by way of a plea of guilty in the Magistrates Court. For example, in 2022/23 the average cost of a matter involving these charges, which resolved by way of a plea of guilty in the District Court, was $2433. The cost of a grant of legal aid to represent someone on a summary plea of guilty in the Magistrates Court is $750. Of course, where more serious offences are linked with a strangulation offence, a Magistrate abstains from hearing a sentence, or where the defendant elects otherwise, charges would continue to the dealt with in the higher courts, at a higher cost per matter.

As foreshadowed, CLS has concerns that the proposal to increase the maximum penalty will reduce the numbers of matters that could proceed by way of summary disposition in the Magistrates Court. The Queensland Sentencing Advisory Council examined sentencing practices for matters where a s315A offence was the most serious offence dealt with.[34] That research indicated very few non-custodial orders were imposed on adults for strangulation

[33] Subject to the Magistrates discretion pursuant to *Criminal Code 1899* (Qld) s 552D.
[34] Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* (May 2024).

(1.3%).[35] It also noted that over the 7-year data period examined, the average and median length of sentences had increased; the average rising from 2 years in 2016-17 (median of 2 years), to 2.7 years in 2022-23 (a median of 3 years).[36]

Cases such as *R v HBZ* (2020) 4 QR 171 and *R v MDS* [2023] QCA 228 support a conclusion that the usual range for non-fatal strangulation would be between 2 to 3 years imprisonment depending on the aggravating and mitigating features of each case. Generally, in cases where there is significantly aggravated or protracted use of significant violence, periods greater than 3 years are imposed.[37]

While an increase to 14 years would not necessarily result in a doubling of sentences at all levels,[38] it is to be expected that an increase in the maximum penalty would lead to more severe penalties.[39] It is well established that increases in maximum penalty typically produce a general increase in the severity of sentences for that offence.[40]

Question 8: What reforms to practice and procedure are needed to ensure just and effective operation of the three new offences?

Improve understanding of non-fatal strangulation and its effects

Training for criminal justice system personnel

CLS supports training for criminal justice system personnel, including investment in continued training of police officers to embed an understanding of trauma-informed interview techniques that avoid the limitations of a traditional incident-focussed approach. This would be particularly important in the context of DFV victim-survivors and accused persons from culturally diverse communities and from within an Aboriginal and/or Torres Strait Islander community. That training should include cultural competency modules, so that cultural norms and environments are properly considered in informing a best-practice approach. To ensure maximum efficacy, training would need to be developed and tailored regarding the specific role and function of each criminal justice system stakeholder.

Education for perpetrators

CLS also supports the development of programs that educate perpetrators about the dangers of non-fatal strangulation, within a broader public education program. However, CLS does not consider that participation in such a program should be mandatory upon conviction.

Public education

CLS supports a public awareness campaign to encourage community dialogue and increase education around the health impacts of strangulation, promote social change, and also increase victim-survivor awareness. CLS recommends extensive consultation with relevant

---

[35] Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* (May 2024), 11.
[36] Queensland Sentencing Advisory Council, *Sentencing Spotlight on choking, suffocation or strangulation in a domestic setting* (May 2024), 13.
[37] For example, see R v MCW [2019] 2 Qld R 344.
[38] *R v Murray* (2014) 245 A Crim R 37 at [16], citing *R v SAH* [2004] QCA 329.
[39] *R v Murray* (2014) 245 A Crim R 37 at [16], citing *R v Benson* [2014] QCA 188
[40] See *QPS v Terare* [2014] QCA 260 at [35]; *R v CBI* [2013] QCA 186 at [19] (and the cases there cited); *R v T; ex parte Attorney-General (Qld)* [2002] QCA 132 at [22]-[23], [29].

health and DFV stakeholders be undertaken in the development and implementation of any public education/awareness campaign.

Improve evidence collection

Evidence from victim-survivors

CLS is concerned about the potential for leading questions being asked under the guise of 'screening questions', particularly by medical professionals who are not trained or have experience in the rules of evidence, but also by police officers. This significantly increases the risk of an inadmissible statements being made, resulting challenges to the admissibility of those statements under the rules of evidence, and that evidence being excluded. CLS is also concerned, particularly in light of the overrepresentation of First Nations victim-survivors, that vulnerable witnesses are likely to easily acquiesce to suggestions, or gratuitous concurrence, affecting the quality of their evidence. See below regarding recent reforms relating to evidence in chief of victim survivors in certain proceedings.

Evidence of Injuries

In terms of improving evidence of injuries, CLS agrees that making hospital attendance mandatory following non-fatal strangulation would unduly undermine individual autonomy.[41] It also may lead to exacerbations in trauma and underlying mental health issues, and compound mistrust of police and/or medical professionals. In the experience of CLS's practitioners it may also lead to increased risk that a vulnerable victim-survivor might lash out at a first responder, incurring criminal charges themselves. Any attempt to increase the evidence of injuries must respect a victim-survivor's right to consent and privacy.

Improve victim-survivors' experiences of the criminal justice system

Information for victim-survivors

CLS supports further investigations and research into appropriate victim and witness support services, to better inform and provide support through the prosecution and judicial processes, in the ways described by recommendation 9 of the Women's Safety and Justice Taskforce.[42] However CLS is cautious about introducing any victim advocate with legal standing in criminal law proceedings, noting strict conditions would need to apply to preserve the integrity of a witnesses version to ensure that miscarriages of justice do not occur, as this has significant potential to cause further trauma to a victim-survivor witness.

Video-recorded evidence-in-chief (VREC)

CLS notes the introduction of the Domestic and Family Violence Protection and Other Legislation Amendment Bill 2025 ('the Bill'), which intends on expanding the VREC pilot statewide. CLS acknowledges the benefit of VREC statements with respect to allowing for the provision of contemporaneous evidence and notes the aim of avoiding re-traumatising victims. However, in CLS' experience, there are some disadvantages to the VREC framework for both the complainant and defendant.

In the case of the complainant, the VREC framework does not reflect trauma-informed practice in several ways. It does not provide an opportunity to have a support person and interpreter present and does not give the aggrieved time to review their statement and make amendments

[41] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [266].
[42] Women's Safety and Justice Taskforce, Hear Her Voice - Report Two: Women and Girls' Experiences across the Criminal Justice System (Report, 2022) recs 9, 49, 63.

or corrections. In CLS's experience, the impact of trauma on memory means that the complainant often benefits from time and space to review their statement and provide further detail or clarity. In terms of cross-examination, a VREC statement is more difficult for the complainant to respond to when compared to an affidavit with numbered paragraphs.

In the case of the defendant, LAQ criminal lawyers practising in the VREC pilot regions of Ipswich and Southport note that, in their experience, the use of VREC statements increases the complexity of giving advice to defendants. As the VREC statement is not disclosed to unrepresented defendants, the lawyer is required to liaise with the Police Prosecution Corps to enable the statement to be disclosed before any advice can be provided. Following receipt of the VREC statement by the lawyer, a longer advice session must be scheduled with the defendant to watch and review the statement and provide subsequent advice. The level of resourcing required by LAQ's duty lawyers and advice clinics to properly advise the defendant is significantly higher in matters involving a VREC statement. This also has the impact of delays in proceedings and increasing remand time for those defendants refused bail. In the experience of LAQ's practitioners, those facing domestic violence charges, including charges for contravening orders, have been increasingly refused bail by police or when first brought before the court.

In terms of the Bill, CLS notes the removal of a requirement for a trained police officer to take a VREC statement. CLS is concerned that, for the complainant, it increases the likelihood that they will, in a time of great vulnerability and possible fear for their safety, be dealing with a police officer who does not have up-to-date training in domestic violence and trauma informed practice. The potential for re-traumatising a complainant is high. For the defendant, it is the experience of LAQ criminal lawyers in the pilot regions that the content and quality of the statements deteriorate in the absence of appropriate training. The conduct of the interview may result in challenges to its admissibility pursuant to the rules of evidence, negating the purpose of the VREC statement and increasing the likelihood of the complainant having to give that evidence at trial. In order to prevent inadmissible parts of a statement forming part of the evidence in a trial, there will be a significant imposition on prosecutors, who are already under significant work burdens, to review and excise those sections in preparation for trial. Where that is unable to occur, defence lawyers and the courts will be required to decipher what edits are required. This represents a significant resourcing issue for those practicing in the Magistrates Courts, and for the courts themselves.

It is CLS's strong view that a comprehensive review of the VREC pilot ought to be undertaken before the pilot is extended state-wide. CLS notes that in 2024 the pilot was extended to "enable further consideration of the use and effectiveness of the VREC".[43] There is no data or information that indicates whether the pilot was successful in achieving its stated purposes. Expanding the pilot in the absence of an examination of its impacts risks significant impact on a defendant's rights to be tried without unreasonable delay and be informed promptly and in detail of the nature and reason for the charge.[44] CLS also requires more information about how a state-wide expansion of the VREC framework would be resourced, in circumstances where defence workloads would be exponentially increased.

Judicial directions

CLS does not consider it is necessary to introduce judicial directions equivalent to ss 103ZY, 103ZV and 103ZU *Evidence Act 1977* (Qld) to non-fatal strangulation trials that involve DFV and/or sexual offending. The referred to directions are part of a suite of directions introduced following recommendations from the Women's Safety and Justice Taskforce following

[43] Explanatory Notes, Evidence (Domestic Violence Proceedings) Amendment Regulation 2024, 1.
[44] *Human Rights Act 2019* (Qld) s 32(2)(a) & (c).

extensive consultation and research, and have only been in force for a little over a year. Where a s 315A offence is charged alongside other sexual offences, the Court is already empowered under Part 6B Division 3 *Evidence At 1977* (Qld) to give such a direction. Victim-survivor concerns regarding police dismissing non-fatal strangulation reports because they come across as too emotional, are better addressed by training for criminal justice system personnel and increased access to victim-survivor support and counselling.

CLS supports the Court's discretion to direct as appropriate, depending on the nature of the case before it. The mandatory nature of the wording in s 103ZY in the use of the language 'must' removes the ability of the parties to ventilate and argue relevant issues which may operate to require such a direction not to be given, or to be given in a different or reduced manner. Should such a direction be considered, it should be reflective of a trial Judge's overarching discretion and the parties' ability to ventilate and litigate the applicability and utility of such a direction.

Rather than creating additional complexities, CLS considers that any potential preconceptions or misconceptions regarding non-fatal strangulation and its effects are better overcome by broad public awareness campaigns and education programs.

Fast-track process

CLS welcomes reforms which strive to streamline and create efficiencies within the criminal justice system. However, CLS would caution that a review of the Sexual Violence Case Management Pilot in the Brisbane and Ipswich District Courts ought to be undertaken prior to establishing any potential similar process for offences such as non-fatal strangulation offences. Such a review is better placed to assess the efficacy of the measures and resources put in place to minimise delay in Court processes and reduce potential re-traumatisation of witnesses.

Restorative justice

CLS is supportive of restorative justice options being available for non-fatal strangulation offences, and for increased availability for restorative justice as an option within the criminal justice system in general. While the concerns raised against restorative justice are valid, they can be managed by implementing an appropriate framework that both supports and protects the participants who chose to engage. CLS encourages reforms that can be applied consistently across the criminal justice system, to ensure equal and fair access.

CLS refers to its submissions on these topics in response to the QLRC's Criminal Defences Review.

Improve verdict options

CLS strongly opposes legislating for alternative verdicts for non-fatal strangulation cases. To do so would add significant complexity to the matters a jury must determine. The prosecution would be burdened to proving the elements of the s 315A offence (which currently explicitly omit an assault element), whilst also seeking to establish an assault, and in some cases, bodily harm, in the event the jury are not satisfied the s 315A offence has not been proved. Indeed, CLS notes the difficulties outlined in the Consultation paper that up to 50% of strangulation victims show no external injuries, and that where there are visible injuries they are usually minor or may be delayed in their presentation.[45] This correspondingly increases the complexity of the matter for defence (including the relevant applicability of defences to each

[45] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [46].

charge), increases in court time for trials, and therefore increased costs. Prolonging the resolution of matters is not in the interests of the defendant and is likely to negatively impact the victim-survivor's experience.

The concerns expressed by prosecutors about charging AOBH or common assault in the alternative on indictment[46] are reflective of a tactical decision which is not unique to this type of offending. In the experience of CLS's practitioners, there are often complex discussions and negotiations underpinning a decision to discontinue a charge or to withdraw and replace with a different charge.[47]

Organisation	Legal Aid Queensland
Address	44 Herschel Street Brisbane QLD 4001
Contact number	[redacted]
Approved by	Nicky Davies, Chief Executive Officer
Authored by	Nikki Larsen, Senior Lawyer (Policy & Law Reform), Criminal Law Services Carl Tessman and Andrew Smith, Public Defenders Chambers

[46] QLRC, Non-fatal strangulation: Section 315A review – a holistic review of the non-fatal strangulation offence (Consultation paper, April 2025), [300].

[47] See also Robin Fitzgerald et al, The Prosecution of Non-Fatal Strangulation Cases: An Examination of Finalised Prosecution Cases in Queensland, 2017 – 2020 (Report, 2022) 25, page 6, referring in general to Douglas, H., & Fitzgerald, R. (2021). Proving non-fatal strangulation in family violence cases: A case study on the criminalisation of family violence. International Journal of Evidence & Proof, 25(4), 350-370. https://doi.org/10.1177/13657127211036175.